No. 15248

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EMIL WENTZ and WILLIAM BERING JENSEN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF OF APPELLANTS.

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I.
JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of conviction in the District Court for the Southern District of California, Central Division. The Appellants were charged in the indictment with having violated the laws of the United States, to-wit, Section 1343, Title 18, U. S. C. A., namely fraud by interstate and foreign wire, in that they devised and intended to devise a scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises would be false when made and that on November 22, 1955, the defendants, for the purpose of executing the

scheme and artifice, caused to be transmitted by means of interstate and foreign wire a signal and sound from Los Angeles to Dallas, Texas, thence to San Antonio, Texas, and thence to Mexico, District Federal, Republic of Mexico [R. 3-6].

Pretrial motions were heard and denied [R. 10-20]. All defendants entered not guilty pleas. Appellants Wentz and Jensen were tried by jury and found guilty as charged [R. 27-28] and thereafter were sentenced on May 25, 1956, to five years and $1,000.00 fine each [R. 31-32].

Notice of Appeal was filed on May 25, 1956 [R. 33-34].

The District Court had jurisdiction to try the case by virtue of the provisions of Section 3231, Title 18, U. S. C. A.

This Court has jurisdiction of the Appeal by virtue of the provisions of Sections 1291-1294, Title 28, U. S. C. A.

II.
STATEMENT OF CASE AND QUESTIONS INVOLVED.

1. Facts and Circumstances.

From on or about the 14th day of November, 1955, and continuing to on or about the 29th day of November, 1955, the defendants Michael Victor Schlising, Emil Wentz and William Bering Jensen devised, and intended to devise, a scheme and artifice to defraud Frank X. Pommer and Selma H. Pommer and to obtain money from the said Frank X. Pommer and Selma H. Pommer by means of the following false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises would be false when made: That the name of the defendant

Michael Victor Schlising was Karl Ober; that the name of the defendant Emil Wentz was James E. Walters; that an organization known as the Metropolitan Company owned all of the horses runing at race tracks; that the defendant Emil Wentz was employed by the said Metropolitan Company as "confidence man" engaged in betting money on "fixed" horse races; that the defendant Emil Wentz was using confidential information received by him from the said Metropolitan Company to make bets on fixed horse (2) races for his own account; that the defendant Emil Wentz would pay to the said Frank X. Pommer and Selma H. Pommer and the defendant Michael Victor Schlising 25% of money won by him from bets so made if the said Frank X. Pommer and Selma H. Pommer and the defendant Michael Victor Schlising would place the said bets for him; that the surname of the defendant William Bering Jensen was Johnasen; that the defendant William Bering Jensen was president of the American Club, Mexico, District Federal, Republic of Mexico, for a period of time including November 19 through November 24, 1955; that the said American Club was engaged in the business of accepting wagers on horse races; that the defendant Emil Wentz had, on November 19, 1955, made a bet on a horse race with the American Club in the sum of $101,500.00, consisting of $1,500.00 in cash and a check for $100,000.00; that as a result of the said bet the defendant Emil Wentz had won $203,000.00; that the defendant William Bering Jensen, as president of the said American Club, would pay $200,000.00 of its funds to the defendant Emil Wentz on condition that the defendant Emil Wentz show to the defendant William Bering Jensen $100,000.00 in cash as evidence that the said check in the amount of $100,000.00

would have been collectible if the wager in which it was used had been lost by the defendant Emil Wentz; that if the said Frank X. Pommer and Selma H. Pommer would advance $24,000.00 in cash to be displayed to the defendant William Bering Jensen in combination with $76,000.00 in cash to be furnished by defendants Michael Victor Schlising and Emil Wentz, said $24,000.00 would immediately thereafter be returned to the said Frank X. Pommer and Selma H. Pommer, together with an additional $25,000.00; that the defendant Michael Victor Schlising had displayed $100,000.00 to the defendant William Bering Jensen, and had received from the defendant William Bering Jensen an additional $200,000.00 in cash to be delivered to the defendant Emil Wentz; that the defendant Michael Victor Schlising thereafter bet and lost $200,000.00 (3) purportedly delivered by the defendant William Bering Jensen to him and all of the money purportedly displayed to the defendant William Bering Jensen, including the said $24,000.00 in cash delivered to the defendant Emil Wentz by the said Frank X. Pommer and Selma H. Pommer; and

On or about November 22, 1955, defendants Michael Victor Schlising, Emil Wentz, and William Bering Jensen, for the purpose of executing the aforesaid scheme and artifice, caused to be transmitted by means of interstate and foreign wire a signal and sound from the City and County of Los Angeles, California, within the Central Division of the Southern District of California, to Dallas, Texas, thence to San Antonio, Texas, and thence to Mexico, District Federal, Republic of Mexico.

The scheme set out in the indictment took place in Mexico City, D. F. The signal and sound referred to

therein was a wire transmitted by Western Union. The wire originated at Los Angeles. Its destination was Mexico City, D. F.

The wire was transmitted by Western Union from Los Angeles to Mexico City by relay through Dallas and San Antonio, Texas [R. 82]. This is the normal routing of telegrams from Los Angeles to Mexico City [R. 70].

2. Questions Involved and How Raised.

A. Is the Message Which the Government Relied Upon to Prove Its Case an Interstate or a Foreign Communication or Transmission?

This question was raised by:

1. Defendants' Motion to Dismiss;
2. Defendants' Motion for Bill of Particulars;
3. Defendants' Motion for Judgment of Acquittal;
4. Defendants' Motion in Arrest of Judgment;
5. Defendants' Motion for a New Trial;
6. Objections to Introduction of Evidence;
7. Objections to Instructions Given;
8. Objections to Court's refusal to instruct as requested by counsel for defendants.

B. Did the District Court Lack Personal Jurisdiction Over Appellant Jensen?

This question was raised by:

1. Defendants' Motion to Dismiss for Lack of Personal Jurisdiction;
2. Defendants' Motion in Arrest of Judgment.

III.
SPECIFICATIONS OF ERROR.

(a) That the court erred in denying Defendants' Motion to Dismiss [R. 13, 55].

(b) That the court erred in denying Defendants' Motion for a Bill of Particulars [R. 13, 57].

(c) That the court erred in denying Defendants' Motion to Dismiss for Lack of Personal Jurisdiction [R. 19].

(d) That the court erred in denying Defendants' Motion for a New Trial [R. 99].

(e) That the court erred in denying Defendants' Motion in Arrest of Judgment [R. 99, 29].

(f) That the court erred in denying Defendants' Motion for Judgment of Acquittal [R. 25].

(g) That the court erred in refusing defendants' proposed Instruction No. 2, which is as follows:

> "The indictment refers to transmittal by interstate or foreign wire.
>
> "Interstate transmission means transmission from any state, territory or possession of the United States to any other state, territory or possession of the United States.
>
> "Foreign transmission means transmission from or to any place in the United States to or from a foreign country."

That is part of the Communications Act of 1934 as amended, Title 47, United States Code, Section 153, of which Title 18 (321), Section 1343, is a part and therefore these definitions as a part of the Communications Act should be given in order to properly define the nature

of interstate transmission by wire, and also a foreign transmission by wire and that they are two distinct matters [R. 92-93].

(h) That the court erred in refusing defendants' proposed instruction No. 4 which is as follows:

> "When the communication by wire shows the destination thereof at its point of origin, that fact is determinative of its character as an interstate or foreign communication." [R. 93.]

(i) That the court erred in refusing defendants' proposed instruction No. 5 which is as follows:

> "Interstate commerce does not include foreign commerce, unless Congress by definition for the purpose of a particular statute includes them both in a single expression." [R. 93.]

(j) That the court erred in giving Government's proposed instruction No. 10 which is as follows:

"A telegram is sent by means of interstate wire," as those words are used in the statute and in the indictment which I have read to you—"if sent by a wire which crosses the state lines, whatever may be its destination" [R. 91-92].

(k) The Court erred in admitting into evidence Exhibit 11, a telegram from Los Angeles, California to Mexico City, District Federal.

IV.
ARGUMENT.

1. The Government Relied on a Foreign Message to Prove Its Case.

Title 18, Section 1343, United States Code—Fraud by Wire:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of interstate wire, radio, or television communication, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined, etc. * * *"

The aforecited section is otherwise known as Section 18(a) of the Communications Act Amendments, 1952, 66 Stat. 722. These amendments are to the Communications Act of 1934 found in Title 47 of the United States Code, Section 53, of the Communications Act, 1934, Title 47, United States Code, Section 153, is as follows:

Definitions (e):

> "Interstate communication or interstate transmission means, communication or transmission: (1) from any state, territory or possession of the United States * * * to any other (6) State, territory or possession of the United States * * * (f) Foreign communication or foreign transmission means communication or transmission from or to any place in the United States to or from a foreign country."

The indictment recites in part as follows:

> "On or about November 22, 1955 defendants Michael Victor Schlising, Emil Wentz, and William Bering Jensen, for the purposes of executing the aforesaid scheme and artifice, caused to be transmitted by means of interstate and foreign wire a signal and sound from the City and County of Los Angeles, California, within the Central Division of the Southern District of California, to Dallas, Texas, thence to San Antonio, Texas, and thence to Mexico, District Federal, Republic of Mexico."

While the Communications Act defines foreign communication and transmission, Section 18(a) of the Communications Act Amendments, 1952, 66 Stat. 722, 18 U. S. C. 1343, refers only to interstate communications. It was the theory of the government and the lower court that a telegram which crosses state lines is interstate, whatever may be its destination. This is not the law. This theory violates a fundamental concept under the Commerce Clause.

U. S. Const., Art. I, Sec. 8, Cl. 3.

Foreign commerce is a branch of the nation's unlimited power over foreign relations. It clothes Congress with that power over international commerce, pertaining to a sovereign nation in its intercourse with foreign nations, and subject, generally speaking, to no implied or reserved power in the states. The law which would be necessary and proper with respect to interstate commerce, would not be necessary or proper in the respect to foreign commerce.

In the field of foreign relations the national government is completely sovereign and the power to regulate

commerce with foreign nations is but a branch of this sovereign power. The power to regulate commerce among the states is, on the other hand, not a sovereign power except for purposes of commercial advantage, in other respects it is confronted at every turn by the police power of the state, and hence requires to be defined in relation to the known and frequently reiterated objectives of that power.

CONSTITUTION OF THE UNITED STATES OF AMERICA, UNITED STATES GOVERNMENT PRINTING OFFICE, 1953.

The fundamental weakness of the government's position was recognized by the Attorney General in his letter of March 30, 1956, to the Speaker of the House of Representatives, Page 4106, *U. S. Congressional and Administrative News,* No. 13, Aug. 5, 1956:

"March 30, 1956.

"The Speaker,
House of Representatives,
Washington, D. C.

"Dear Mr. Speaker: Section 18(a) of the Communications Act Amendments, 1952 (66 Stat. 711, 722) amended title 18 of the United States Code by adding a new section 1343 as follows:

" 'Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of (interstate) wire, radio or television communication, any writings, signs, signals, pictures, or sounds for the pur-

pose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than 5 years, or both.'

"Last year a case arose in which it was alleged that the subject in the execution of a scheme to defraud used the telephone, calling from a point in Mexico to Los Angeles, Calif. Because of the limitation in the statute to frauds involving 'interstate' wire, radio, or television communication it was concluded that the telephone call from Mexico, being not an interstate communication but rather a foreign communication, was not covered by the section.

"This case demonstrates the need for amending the statute so that it will reach not only interstate communications but foreign communications as well. If so amended, the statute will cover, for example, telephone calls from Canada made by fraudulent stock promoters to victims residing in the United States. Furthermore, the amendment would remove any doubt as to the applicability of the statute to a communication between a State and a Territory or between a State and the District of Columbia.

"A draft of a bill to accomplish the suggested amendment is enclosed for your consideration and appropriate action.

"The Bureau of the Budget has advised that there is no objection to the submission of this recommendation.

"Sincerely,

....., Attorney General."

On July 11, 1956, Public Law 688 was enacted by Congress Amending Section 1343 of Title 18, United States Code as follows: Page 3815 of *U. S. Code Congressional and Administrative News,* No. 13, August 5, 1956.

> "Section 1343 of title 18, United States Code is amended to read as follows:
>
> §1343. Fraud by wire, radio, or television.
>
> "Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.
>
> "Approved July 11, 1956."

It was stated at page 4106 of *U. S. Code Congressional and Administrative News,* No. 13, August 5, 1956, as follows:

> "This bill is designed to close a loophole in the present law, which limits the prosecution of frauds involving wire, radio, and television communication to interstate transactions only. It would extend this coverage to foreign communications as well."

It is conceded that there was substantial evidence of a scheme to defraud within the meaning of the statute.

What is controverted is that the Appellants caused to be used an interstate wire in the execution thereof.

The wire originated at Los Angeles, California on November 22, 1955, and the destination indicated thereon at that time and place was Hotel Reforma, Mexico, D. F., Mexico [R. 48-49].

In *Border Pipe Lining Co. v. Federal Power Commission,* 171 F. 2d 149 (1948), there was a petition to review an order of the Federal Power Commission. The petitioners were exporters of natural gas to Mexico under permit from the Federal Power Commission. Petitioners output of natural gas went to an industrial consumer who transported the gas to Mexico and used it there. Petitioners had complied with the export requirements of the Act, but not the interstate requirements. The question before the court was whether or not petitioners were engaged in interstate commerce within the provisions of the Natural Gas Act. Setting aside the order, the court held that petitioners were not engaged in interstate commerce within the provisions of the Act. In so doing the court stated as follows:

> "Interstate commerce does not include foreign commerce, unless Congress by definition for the purpose of a particular statute includes them both in a single expression."

Page 150 of the opinion sets out examples of the various definitions outlined by Congress.

> "The prime responsibility for making statutory meaning clear is on the Congress. It is bad for the court to twist strange results out of otherwise understood expressions of the legislature."

In *Powell v. United States,* 112 F. 2d 764 (4th Cir., 1940), the defendants were indicted for failure to observe their published tariffs under the Elkins Act, 49 U. S. C. 41. In this case it was argued by the Government that the shipment was not in foreign commerce. The shipping order involved showed on its face "for export," the Court at page 767 of the Opinion stated:

> "There can be no question but that the shipment was intended at its inception as a movement in foreign commerce. . . . There was an original and continuing intention on the part of those having control of the shipment that unless rejected, it should proceed to a foreign destination and this, we think was determinative of its character."

The defendants are charged in the indictment with transmission by interstate and foreign wire a signal and sound from Los Angeles, California, through points in Texas to Mexico.

The language used imparts continuity. It is obvious that there is but one message and that message originated at Los Angeles and was from the outset a foreign message to the Republic of Mexico. As such it was not within the statute. The expression "thence" imparts continuity, that the following course is continuous with the one before it.

Flagg v. Mason, 141 Mass. 66, 6 N. E. 702.

In *State of Texas v. Anderson, Clayton & Co.,* 92 F. 2d 104, Cert. Den. 58 S. Ct. 265, 302 U. S. 747, the Court ruled:

> "In determining whether a particular freight movement is interstate or foreign commerce, the intention existing when the movement started governs."

In *R. J. Reynolds Tobacco Co. v. Robertson,* 22 Fed. Supp. 187, Affd. 94 F. 2d 167, Cert. Den. 58 S. Ct. 944, 304 U. S. 563, the Court ruled:

> "Cigarettes consigned to foreign customers assumed export status when they were delivered from warehouse to carrier, so as to bring the shipment under Federal control."

In *Branch v. Federal Trade Commission,* 141 F. 2d 31, a cease and desist order was issued by the Federal Trade Commission against petitioner who operated a correspondence school. He sent courses to students in foreign countries and insists that the Federal Trade Commission had no jurisdiction over his operation. The legislation involved covered both interstate and foreign commerce. The court held that the business dealings of petitioner with his customers in foreign countries is foreign commerce within the meaning of the Constitution and the Act.

In *Empresa Siderurgica v. Merced Co.,* 337 U. S. 154, at 157, the court stated:

> "It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is the certainty that the goods are headed for their foreign destination and will not be diverted to domestic use."

2. The Court Lacked Personal Jurisdiction Over Appellant Jensen.

This point was raised in Appellants' Motion to Dismiss for Lack of Personal Jurisdiction [R. 15].

An affidavit was submitted by Jensen in connection with his Motion for the reason that he had been illegally abducted in Mexico City, Republic of Mexico, and taken from there to Loredo, Texas where he was delivered into the custody of the United States, thereby depriving him of the choice of entering the United States voluntarily [R. 17].

Jurisdiction over the person of Appellant Jensen was acquired in violation of laws of the United States and international agreement.

Jurisdiction of the person of a defendant cannot be acquired in violation of a federal statute. Personal jurisdiction of Appellant was acquired by the Federal Court through the illegal acts of Federal officers.

McNabb v. United States, 318 U. S. 332.

In the *McNabb* case the court held that a defendant could not be convicted on the basis of confession obtained by federal agents in violation of a federal statute. Appellant should have been restored the choice of entering the country voluntarily.

United States v. Rosenberg, et al., 195 F. 2d 583 (C. A. 2).

3. **The Court Erred in Refusing Appellants' Proposed Instructions Nos. 2, 4 and 5 [R. 92] and in Giving Instructions No. 10 [R. 91].**

The indictment itself refers to transmittal by interstate and foreign wire, yet the court refused to define these terms as set out in the act. In fact there was no instruction respecting foreign transmission by wire [R. 92].

Proposed Instructions Nos. 4 and 5 merely stated the law on the subject matters contained therein as pointed out earlier in this argument [R. 93].

Conclusion.

The judgment of the lower court should be reversed.

Dated: Los Angeles, California, December 12, 1956.

Respectfully submitted,

Angus D. McEachen,

Attorney for Appellants.